(3)

No. 88-76

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

CROCKER NATIONAL BANK,
CROCKER PROPERTIES, INC., and
PACIFIC GATEWAY ASSOCIATES JOINT VENTURE,
Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO,
Appellee.

On Appeal from the Supreme Court of the State of California

BRIEF OF AMICUS CURIAE BLUE JEANS EQUITIES WEST IN SUPPORT OF JURISDICTIONAL STATEMENT

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INTEREST OF AMICUS CURIAE

Amicus curiae Blue Jeans Equities West is the developer of a mixed-use office and commercial project in the City of San Francisco known as Levi's Plaza. The project was constructed pursuant to a conditional use permit authorized by the City Planning Commission in its Resolution No. 8142 of January 4, 1979.[1]

* Throughout this brief, emphasis in quotations is supplied by us and footnotes are omitted unless otherwise indicated.

[1] The permit issued to amicus curiae thus predates by approximately six and eight months respectively the permits issued by the Planning Commission for the developments of appellants Crocker National Bank/Crocker Properties, Inc. ("Crocker") and Pacific Gateway Associates Joint Venture ("Pacific Gateway"). See Jurisdictional Statement at 2-3.

After enacting its Transit Impact Development Fee ("TIDF") Ordinance No. 224-84 on May 5, 1981, appellee City and County of San Francisco ("City") asserted the retroactive application of the TIDF to the Levi's Plaza project, pursuant to the following condition of the use permit:

> The owner of the project shall make a good faith effort to participate in future funding mechanisms to assure adequate transit service to the area of the city in which the project is located.

Amicus curiae filed an action in the San Francisco Superior Court *(Blue Jeans Equities West v. City and County of San Francisco,* No. 814330), challenging the application of the TIDF to the project on due process, unlawful taking and other constitutional grounds. By agreement of the parties, that action has been held in abeyance pending the final outcome of the Crocker and Pacific Gateway proceedings which are the subject of this appeal. The City contends that a fee of $3,102,409.75 is due for the Levi's Plaza project under the TIDF ordinance; pursuant to the parties' agreement, amicus curiae has paid that amount into an escrow account.

Amicus curiae files this brief in support of the jurisdictional statement,[2] particularly the second question presented therein as to the adequacy, under the Due Process Clause of the Fifth Amendment, of the notice purportedly given by the City that the rights acquired by appellants and amicus curiae under their permits were subject to the City's future imposition of the TIDF against their respective projects.

SUMMARY OF ARGUMENT

The Due Process Clause governs the procedures by which a State places conditions in a development permit that allegedly authorize the State's subsequent abrogation of the landowner's vested property rights. That Clause requires the State to give the landowner reasonable notice of the scope

[2] With the written consent of the parties to this appeal (see Exhibits 1 and 2, *post*).

and import of the permit condition at the time the permit is issued. The City violated appellants' due process rights by retroactively applying the TIDF Ordinance to their projects, on the sole basis of a permit condition that failed reasonably to disclose the City's subjective intention to deprive appellants of their vested rights by a subsequent ordinance of that character.

In reviewing the City's actions, the California Supreme Court committed fundamental error by failing to apply the objective due process standards established by this Court to determine whether the City's notice was adequate "reasonably to convey the required information . . . ." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The California court wrongly denigrated appellants' reliance on those constitutionally-mandated standards as the mere manifestation of appellants' "good faith subjective belief" concerning their rights. App., 16a, 44 Cal. 3d at 853, 244 Cal. Rptr. at 690.

ARGUMENT

I. Due Process Requires A Government Body To Provide ReasonaNle Notice Of Future Exactions Which Are The Intended Conditions Of A Development Permit.

The issue on this appeal is whether a condition in a development permit that allegedly authorizes a subsequent abrogation of vested property rights must provide reasonable notice to the developer in order to comply with the Due Process Clause.

The California Supreme Court conceded in this case that, absent the permit condition relied on by that Court, the application of the TIDF Ordinance to appellants or other parties whose development entitlements were secured before

the passage of the Ordinance "would impair their vested rights and violate due process.[3] App., 6a,[4] 44 Cal. 3d 839, 846, 244

[3] The attainment of vested development rights is itself an extraordinarily difficult, expensive and uncertain process under California law. The general California vesting rule, as stated by the California Supreme Court in *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal. 3d 785, 791, 132 Cal Rptr. 386, 389 (1976), *appeal dismissed*, 429 U.S. 1083 (1977), and reiterated in the present case, App., 5a, 44 Cal. 3d at 845-846, 244 Cal. Rptr. at 684, is as follows:

> [I]f a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the permit.

Under this rule, however:

> [N]either the existence of a particular zoning *nor work undertaken pursuant to governmental approvals preparatory to construction of buildings can form the basis of a vested right to build a structure which does not comply with the laws applicable at the time a building permit is issued.* By zoning the property or issuing approvals for work preliminary to construction the government makes no representation to a landowner that he will be exempt from the zoning laws in effect at the subsequent time he applies for a building permit or that he may construct particular structures on the property, and thus the government cannot be estopped to enforce the laws in effect when the permit is issued.

Avco, 17 Cal. 3d at 793, 132 Cal. Rptr. at 391; see also, *e.g., Oceanic California, Inc. v. North Central Coast Regional Commission*, 63 Cal. App. 3d 57, 133 Cal. Rptr. 664, *appeal dismissed*, 431 U.S. 951 (1977).

A lower California court has harshly criticized the Draconian quality of this rule, characterizing it as, among other things, the "handmaiden of prevailing administrative anarchy [which] gives a green light to administrative vacillation virtually up to the moment the builder starts pouring concrete." *Raley v. California Tahoe Regional Planning Agency*, 68 Cal. App. 3d 965, 985, 137 Cal. Rptr. 699, 711-712 (1977). Even the author of the *Avco* opinion, Justice Mosk, has protested against the inequity and rigidity of its vesting rule as subsequently interpreted by his colleagues. *Pardee Construction Co. v. City of Camarillo*, 37 Cal. 3d 465, 473-476, 208 Cal. Rptr. 228, 233-235 (1984); *Santa Monica Pines, Ltd. v. Rent Control Board*, 35 Cal. 3d 858, 869-870, 201 Cal. Rptr. 593, 600-601 (1984).

Despite these criticisms, the California vesting rule remains unaltered, and thus in the present case the California Supreme Court only recognized appellants' vested rights because they "had been issued building permits, had begun construction, and had made a substantial financial commitment to their projects almost two years before the City enacted the TIDF ordinance." App., 6a, 44 Cal. 3d at 846, 244 Cal. Rptr. at 685.

[4] All references to "App." herein are to the appendix of appellants' jurisdictional statement.

Cal. Rptr. 682, 685 (1988). The Court thus held that the permit condition—in and of itself—satisfied appellants' rights to due process.

Having adopted that premise, the California Supreme Court then erred fundamentally by ignoring settled due process principles in determining whether the City, through the permit condition, had sufficiently conveyed to appellants its intention to subject their development entitlements to divestiture by later application of the TIDF Ordinance. Instead of focusing on whether the City had given appellants reasonable notice of the drastic limitation on their property rights at the time those rights were perfected, the court treated appellants' permits as "legislative acts" to be construed in accordance with the City's unilateral intentions and without regard to appellants' understanding of their import. App., 6a-17a, 44 Cal. 3d at 846-853, 244 Cal. Rptr. at 685-690. In short, the court looked to the wrong pan of the due process balance.

This Court has frequently stated that protection of property rights under the "Takings Clause" of the Fifth Amendment depends in large part on whether the challenged governmental action interferes with the owner's "distinct investment-backed expectations ...." *E.g., Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 349 (1986). In making its judgments as to the expectancies that deserve constitutional protection, the Court has been at pains "to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

The interchange between a property owner seeking a development permit and the government body authorized to issue that permit is equally as important from the standpoint of the Due Process Clause as the interchange which later occurs if the government seeks to abridge the rights previously granted. It is at the permit-issuing stage that the property owner *forms* the expectations for which he will supply invest-

ment backing and upon which any claim on his part to protection against subsequent governmental incursions must be founded. The landowner's application for a development permit is not one which merely seeks a privilege or a form of governmental largesse. As Justice Scalia declared for the Court only last year:

> [T]he right to build on one's own property— even though its exercise can be subjected to *legitimate* permitting requirements—cannot remotely be described as a "government benefit." And thus the announcement that the application for *(or granting of)* the permit will entail the yielding of a property interest cannot be regarded as establishing [a] voluntary "exchange". . . .

Nollan v. California Coastal Commission, ___ U.S. ___, 107 S.Ct. 3141, 3146 n.2 (1987).

The Court held in *Nollan* that exercise of the governmental power to condition the development of property is subject to the substantive limitations of the Fifth Amendment. 107 S.Ct. at 3146-3148. It follows that the *process* by which that power is employed is equally subject to the due process strictures of that Amendment. Otherwise, government would be free to impose any manner of condition without procedural restraints, and the owner's "right" to seek entitlement for development, subject to "legitimate permitting requirements," would quickly dissolve.

Even in those instances where an individual acquires property rights based entirely on state law, the Court has adhered strongly to the view that the Due Process Clause controls the *procedures* leading to any potential deprivation of those rights.

> "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process is conferred, not by legislative grace, but by constitutional guarantee.

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541 (1985).

> [M]inimum requirements [of procedural due process] being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.

Vitek v. Jones, 445 U.S. 480, 491 (1980); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982); *Santosky v. Kramer*, 455 U.S. 745, 755 (1982).

In this case the California Supreme Court sanctioned a procedure which allowed constitutionally-protected rights acquired under a development permit to be destroyed by a condition in the permit because the issuing entity, acting as a "legislative" body, unilaterally intended the condition to have that effect. The California court deemed it irrelevant whether that official intention had been adequately communicated to, or reasonably understood by, the property owner-applicant. It dismissed the owner's plea for such communication as a mere attempt to base vested rights on "good faith *subjective* belief . . . ." App., 16a, 44 Cal. 3d at 853, 244 Cal. Rptr. at 690. That mischaracterizes appellants' position and ignores the constitutional issue. *Neither appellants nor amicus curiae rely on "subjective belief."* They contend that they are entitled to *reasonable notice* of the government's intentions under the *objective standards* that this Court has consistently applied in due process cases. See discussion at pp. 9-11, *post.*

The City here seeks refuge in "the peculiar proposition that a unilateral claim of entitlement by the government can alter property rights." *Nollan, supra*, 107 S.Ct. at 1346 n. 2.[5] That proposition is, of course, false:

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[5] Professor Tribe, in the most recent edition of his treatise, has deftly paraphrased the underlying official attitude which gives rise to this fallacy:

> [I]t is possible for government to take a very different tack in defense of its actions. It might say simply: "You can't complain of *any injury at all*, since *you never had* what you claim we have taken away. From the very beginning, your property was subject to the *condition* that if and when we thought it wise to do so, we could restrict it as we have or transfer it as we have.

Tribe, *American Constitutional Law* 607 (2d ed. 1988) (emphasis in original).

(Footnote continued on following page)

> [A] State, by *ipse dixit*, may not transform private property into public property without just compensation, . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That clause stands as a shield against the arbitrary use of governmental power.

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980).

Reasonable notice is "an elementary and fundamental requirement of due process . . . ." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Greene v. Lindsey*, 456 U.S. 444, 449 (1982). A property owner who seeks permission to develop must receive sufficiently precise information concerning the conditions of the proffered permit that he may reasonably evaluate the risks of proceeding under the stated conditions. A permit condition lacking in such specificity deprives the owner of that opportunity, and reduces the process of obtaining a development entitlement to a perilous and unpredictable game of chance. Over the years, the Court has evolved important procedural principles which supply the essential cornerstones of regularity and reliability for the critical interactions between the government and its citizens. Application of those principles is urgently needed in cases such as this to ensure that a landowner who seeks, obtains and relies upon a governmental development permit receives the process that is contitutional due.

(Footnote continued from previous page)

This Court, like Professor Tribe (see *id.* at 608, 609), holds a distinctly opposite view. Such a "naked assertion" of reserved governmental authority "collides with not merely an 'economic advantage' but an 'economic advantage' that has the law back of it to such an extent that courts may 'compel others to forbear from interfering with [it] or to compensate for [its] invasion.' . . . . [Governmental consent] can lead to the fruition of a number of expectancies embodied in the concept of 'property'—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property." *Kaiser Aetna v. United States*, 444 U.S. 164, 178-179 (1979) (quoting in part *United States v. Willow River Co.*, 324 U.S. 499, 502 (1945).

II. The City's Notice Of Future Deprivation Fell Far Short Of Due Process Standards.

In *Mullane, supra,* the Court affirmed that, in order to meet due process standards, *"notice must be of such nature as reasonably to convey the required information* . . . . The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, ..." 339 U.S. at 314-315. "In the years since *Mullane* the Court has adhered to these principles, balancing the 'interest of the State' and 'the individual interest sought to be protected by the Fourteenth Amendment.' " *Tulsa Professional Collection Services v. Pope,* ____U.S. ____,108 S.Ct. 1340, 1344 (1988); see also, *e.g., Mennonite Board of Missions v. Adams,* 462 U.S. 791, 795-800 (1983); *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 13-15 (1978); *Schroeder v. City of New York,* 371 U.S. 208, 211-213 (1962); *Greene v. Lindsey, supra,* 456 U.S. at 449-456.

While *Mullane* and its progeny have focused mainly on the *method* by which notice is given, the Court has also made clear that the Due Process Clause regulates the *content* of notice as well. See *Memphis Light, Gas & Water Div. v. Craft, supra,* 436 U.S. at 12-13. Even personal service of notice to every individual affected by a governmental act is a futility if the notice given does not "reasonably . . . . convey the required information, ..." *Mullane, supra,* 339 U.S. at 314. The notice itself, as well as the means by which it is delivered, "must be such as one desirous of actually informing the [recipient] might reasonably adopt to accomplish it." *Id.* at 315.[6]

Here the City asserts that it gave appellants reasonable and adequate notice of a substantial future fee—directed

[6] The Court's evaluation of appellants' permits by these standards is in no way foreclosed by the California courts' expansive construction of the permit language. Where adherence to due process depends on the reasonable significance of language in a contract or similar instrument, this Court's own interpretation of the critical language is controlling. See *Fuentes v. Shevin,* 407 U.S. 67, 95-96 (1972); *Memphis Light, supra,* 436 U.S. at 13-15.

solely against appellants and other applicants for new development—by requiring appellants to participate in a "downtown assessment district, or similar fair and appropriate mechanism, to provide funds for maintaining and augmenting transportation service . . . ." App., 40a. In like manner, the City contends that amicus curiae received such notice when the City Planning Commission required it to "make a good-faith effort to participate in future funding mechanisms to assure adequate transit service to the area of the city in which the project is located." *Ante*, p. 2. On the basis of these purported disclosures, the City maintains that appellants, amicus curiae and other developers receiving similar signals could reasonably divine the City's intent to make those developers alone subsidize the peak-period transit service allegedly necessitated by their projects, whereas all other users of (and contributors to the need for) peak-period service would pay nothing toward its costs.

As appellants have ably demonstrated in their Jurisdictional Statement, the TIDF Ordinance is constitutionally suspect because it is a classic example of "loading upon one individual more than his just share of the burdens of government" (*Monongohela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893)), and of "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The suspect character of the Ordinance magnifies the governmental obligation to provide clear notice of its potential retroactive application to projects previously approved. Appellants and amicus curiae cannot reasonably be held to a standard which required them to anticipate that "good faith" would obligate them to participate in such a one-sided scheme, or that the City would regard it as a "fair and appropriate mechanism" for meeting a transit need created in varying degrees by every property owner in "the area of the City in which the project is located." Both the dissenting Chief Justice of the California Supreme Court and the two judges who comprised the majority of the California Court of Appeal recognized that "since the entire downtown area is affected by the peak demand in ridership,

it would be unreasonable to expect plaintiffs to anticipate that only a few [new] office buildings would be covered by the funding mechanism." App., 21a, 42a.

The unreasonableness of the burden which the City placed on appellants' property rights by the opaque form of notice it adopted in this case warrants plenary review by this Court. Indeed, the fundamental error of the court below calls for reversal, even if this Court then determines to return the case to that court for application of the correct due process standard in the first instance. Under the decision below, any government body can, with constitutional immunity, frame a deceptively comforting permit condition which assures the applicant "fair and appropriate" treatment and purports to respect the applicant's "good faith" judgment as to such matters, while subjectively intending to impose "whatever financing mechanism would be developed as a result of the City's ongoing study of the transit funding problem." App., 13a, 44 Cal. 3d at 851, 244 Cal. Rptr. at 689. The Due Process Clause does not countenance such a schism between governmental expression and intention where constitutionally-protected rights of property are thereby imperiled.

CONCLUSION

For the reasons stated, the Court should note probable jurisdiction of the substantial federal question presented on this appeal.

Respectfully submitted,

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By /s/ JOHN D. HOFFMAN
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Counsel for Amicus Curiae
Blue Jeans Equities West

September 13, 1988

EXHIBIT 1

[LETTERHEAD]

August 4, 1988

Mr. James P. Bennett
Morrison & Foerster
345 California Street
San Francisco, California 94104

Re: Crocker National Bank v.
City & County of San Francisco,
Supreme Court of the United States
Docket No. 88-76

Dear Mr. Bennett:

As you know this firm represents Blue Jeans Equities West, which like your clients owns property that San Francisco contends is subject to the transit impact development fee. Pursuant to Supreme Court Rule 36.1 we ask your consent to our filing of an *amicus curiae* brief in support of your appeal. Please indicate your consent by signing this letter in the space shown below and returning the letter to me in the self-addressed stamped envelope enclosed.

Thank you for your courtesy in this matter.

Very truly yours,

Kenneth N. Burns

Consent Granted:

Morrison & Foerster

_____

James P. Bennett
Counsel for Appellants

EXHIBIT 2

[LETTERHEAD]

August 12, 1988

Steven L. Mayer, Esq.
Howard, Rice, Nemrovski, Canady,
Robertson & Falk
Three Embarcadero Center, 7th Floor
San Francisco, California 94111

Re: Crocker National Bank v.
City and County of San Francisco,
Supreme Court of the United States
Docket No. 88-76

Dear Mr. Mayer:

As discussed in our telephone conversation today, this firm represents Blue Jeans Equities West which is the plaintiff in pending Action No. 814330 challenging the application of San Francisco's Transit Impact Development Fee to its Levi's Plaza project. Pursuant to Supreme Court Rule 36.1 we ask your consent to our filing an *amicus curiae* brief in support of the jurisidictional statement in the above appeal. Please indicate your consent by signing the original of this letter in the space shown below and returning the letter to me in the self-addressed stamped envelope enclosed. A copy of the letter is enclosed for your files.

Thank you for your courtesy in this matter.

Very truly yours,

John D. Hoffman

Consent Granted:

Howard, Rice, Nemerovski,
Canady, Robertson & Falk

Steven L. Mayer
Counsel for Appellee
City and County of San Francisco